APPEAL NO. 93505

On May 17, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue determined at the contested case hearing was whether appellant (claimant) had sustained an injury by lifting a transmission on (date of injury), while employed by (employer) as a mechanic. The hearing officer determined that the claimant had sustained an injury to his back. The hearing officer ordered that applicable temporary income benefits and medical benefits be paid in accordance with her decision, income benefits being paid if claimant had, or could, establish disability (as that term is defined in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1993) (1989 Act).)

The carrier has appealed, arguing that the evidence was insufficient to prove that claimant's injury occurred. The carrier further complains of the order issued by the hearing officer for payment of benefits, arguing that such payment was not in issue and thus an order to pay benefits was an abuse of discretion. The carrier further argues that there was no transmission on the floor to be moved, but, alternatively, moving such transmission would have been beyond the course and scope of employment because the presence of the transmission relat ed to unauthorized work on a coworkers' vehicle. The carrier further asserts that the supervisor's testimony clearly establishes that claimant did not report an injury on the job until after he was terminated. The carrier points out that only claimant's testimony supports his claim, and, as such, the great weight and preponderance of the evidence is against the hearing officer's decision. The claimant responds that the decision should be affirmed, that the supervisor admitted that he could not remember conversations with the claimant, and that the bulk of the evidence supports the decision.

DECISION

We affirm the hearing officer's decision.

This was a lengthy hearing, devoted largely to peripheral matters such as claimant's termination, the employer's policy on notice, and the extent of claimant's employment after he left the employer. The core of relevant evidence to the sole issue of whether an injury was sustained in the course and scope of employment on (date of injury), may be briefly summarized.

The claimant stated that on (date of injury), he injured his back while lifting a transmission that was on the ground to a bench to enable the porter to clean his work station. He stated that the transmission weighed about 80 pounds, and was left there from a project he had done about two months earlier. This project was the replacement of a transmission of a coworker's car.[1]

[1] This project was the subject of much controversy. According to the employer's dispatcher, (Mr. C), work on employees' vehicles was permitted providing that a work slip was written up on the project. Mr. C affirmed that work slips had on occasion been written up after work was in progress. Because claimant, as his attorney repeatedly pointed out, never contended that he was injured while working on the transmission, we need not decide whether an otherwise permitted activity departs from the course and scope of employment simply

The activity occurred during the lunch hour on (date of injury), a Friday. The porter, JG, confirmed in his testimony that he cleaned claimant's station at that time, although he could not recall if he saw the transmission in question. Claimant testified that he reported to the replacement dispatcher, (Ms. G), that he was not feeling good and left. Claimant attempted to schedule a doctor's appointment but the earliest one he was able to get was on the following Tuesday.

Claimant stated that he called in Monday morning to say he was sick. He admitted that he told no one of a job-related injury until Tuesday morning, July 14th. His reason was that he was afraid he would be fired because he had four previous job injuries. Although he did not say he had been expressly threatened with firing if he had another injury, he testified to his impression that his job was at risk. Claimant stated that he reported his injury and was subsequently fired.

The claimant stated that he also injured his back when working for the employer in March 1992, when he stepped into a hole. He stated that he was still being treated for that injury up to (date of injury). However, he stated he did not lose a compensable amount of time from work from this injury, and that the pain, while constant, was minimal. Claimant testified that after his (date of injury), injury, he was in severe pain for nearly two weeks, and it gradually subsided. Claimant said he was treated for his July injury with anti-inflammatory drugs, pain pills, and muscle relaxers.

The claimant sued the employer for wrongful termination. This fact was brought out by tender, and admission, of the petition into evidence. The carrier was permitted to cross-examine from this document. Carrier's tender of (TEC) records related to the claimant's application for unemployment benefits was also admitted.

Ms. G testified that claimant came to her on Friday and said he needed to leave to check on something, and would call later to see if there was work. She stated he never called later. On the morning of July 14th, Ms. G said that claimant reported to her and said that he needed time off and that "the doctor said six months." She told him that he needed to go down and talk to the manager.

(Mr. H), identified as the assistant service manager for the employer, and claimant's immediate supervisor, stated that claimant, on the morning of the 14th, reported first to the dispatcher, then came to him and was terminated by (Mr. B). He stated that upon termination, claimant asked if it was because he had a work-related injury. Mr. H stated that Mr. B told claimant they didn't know he was hurt and asked him to fill out an injury report.

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because the paperwork is not in order.

While Mr. H agreed that it was the porter's job to clean up work stations and lift objects in his path, he confirmed that mechanics were issued buckets and mops and were expected to do cleanup for safety reasons. If there was an object on the floor in the porter's way, he would expect it to be picked up before the porter got there.

Mr. H affirmed that the employer's policy on reporting injuries was that it be done when the injury occurred.

A transcribed interview with Mr. B, who did not testify at the hearing, was admitted over the claimant's objection. In it, Mr. B contended that he first heard of the injury around quarter of nine the morning of July 14th, when claimant came to his office and asked for six months off to obtain physical therapy. Mr. B then qualified his statement by saying that at first he thought claimant was speaking of a previous injury when claimant stepped into the hole, but later in the statement Mr. B indicated that claimant told him he had been hurt the previous Friday. Mr. B stated that although the determination to fire claimant had already been made, that claimant reported "this injury to me before I had the opportunity to discuss our plans with him."

The regular dispatcher, (Mr. C), stated that when claimant called in on Monday morning, he reported to Mr. C that he was hung over. He agreed that it would be unusual for a mechanic calling in sick to report being hung over as the reason for not coming to work.

The claimant's mother, who lived three or four houses away from him, stated that claimant was flat on his back most of the weekend due to pain, and she went to his house frequently that weekend to assist. She stated that on Friday, claimant came to her house from work and called the doctor from her house, and that he told her he had been hurt picking up a transmission.

Claimant's doctor, on July 14, 1992, reported an acute lumbar strain, and prescribed physical therapy and medication.

THE HEARING OFFICER'S ORDER

The 1989 Act, Article 8308-6.34(g), directs a hearing officer to issue a written decision after a hearing that includes a determination of whether benefits are due, and an award of benefits due. Once a determination is made that an injury was compensable, a carrier becomes liable for all health care reasonably required by the nature of the injury, as set forth in Article 8038-4.61. There need be no separate disputed issue expressly raised for the hearing officer to confirm this obvious entitlement. Should a carrier dispute the amount of medical payments, the medical necessity of the service, or the compliance with medical rules and procedures such as pre-authorization, those disputes must be raised through the hearing procedures set forth under Article 8038-8.26, and in accordance with Article 8038-

4.68 and applicable rules.

The hearing officer's award of temporary income benefits tracks the language of entitlement to those benefits as set forth under Article 8038-4.22 and 4.23. While it would have been advisable for the parties to raise a disability issue along with the course and scope issue, neither did. The hearing officer's order did not obviate the need for the claimant to establish disability, as defined in Article 8308-1.03(16). In awarding benefits, the hearing officer carried out a clear statutory direction to render an award.

WHETHER AN INJURY OCCURRED IN THE COURSE AND SCOPE OF EMPLOYMENT ON (DATE OF INJURY)

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Article 8308-6.34(e). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). As we have stated many times, an aggravation of a pre-existing condition is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). A carrier that wishes to assert that a pre-existing condition is the sole cause of an incapacity has the burden of proving this. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

A claimant's testimony alone is sufficient to establish that an injury has occurred. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The contention of the carrier that the lifting of the transmission is beyond the course and scope of employment is wholly without merit. Claimant did not contend he was injured during an asserted unauthorized transmission repair. Rather, he was lifting the object off the ground to enable another employee to clean the area. Based upon claimant's testimony, as well as Mr. H's testimony of some expectation that a mechanic would move such an object out of the porter's way, such activity leading to the injury is clearly placed within the definition of "course and scope of employment" set forth in Article 8038-1.03(12).

The vigorously argued failure of claimant to give notice on the day of the occurrence is also insufficient to negate the occurrence of an injury. As the hearing officer repeatedly pointed out, the failure to give notice as required under Article 8308-5.01, which allows thirty

days, was not in issue. The trier of fact in this case was entitled to weigh the claimant's admitted failure to immediately notify his employer of the accident along with his explanation for the failure, and his uncontroverted notice that was given on July 14th. Omission of facts from the statement of evidence is not error. Texas Workers' Compensation Commission Appeal No. 92185, decided June 18, 1992.

Contrary to the assertions in carrier's appeal, the carrier was permitted to offer the lawsuit petition and to cross-examine from it. Some objections were made, and a few were sustained. The petition was admitted. It was within the fact finder's purview to determine the relevance of any perceived inconsistency with the TEC records.

Although there were conflicting portions of the evidence, these were for the trier of fact to weigh. Claimant's testimony alone would be sufficient, when believed by the fact finder, to support a finding of compensability. We note that there were many portions of claimant's testimony corroborated by other witnesses. The hearing officer's determination that a compensable injury occurred is sufficiently supported by the record, and we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge